

## Chapter 6

# The right of reproduction

Caterina Sganga\*

Forthcoming in E.Rosati (ed), *Research Handbook on EU Copyright Law*, Routledge, 2021

### Abstract

The right of reproduction - commonly considered the core of copyright - has always been the first entitlement to face the challenges raised by technological developments. The digitization of protected works and the advent of the internet have drastically broadened the range of conducts involving acts of copying, triggering heated policy discussions on the optimal extension of exclusivity. Against the silence of international sources, the EU legislator has harmonized this right in the Software, Database and InfoSoc Directives. However, the broad definitions and unclear exceptions provided therein have created greater uncertainties. National courts have struggled with the classification of a wide range of new technological processes and with the treatment of partial and temporary reproductions, while scholars have raised concerns on the effect that an overstretching of the right would have had on the functioning of the internet, the development of digital markets, and users' enjoyment of their digital freedoms. The chapter illustrates the path leading to the definition of the right of reproduction by international and EU sources, delineates the uncertainties regarding its scope, and comments on the evolution of the notion in the case law of the Court of Justice of the European Union (CJEU), highlighting positive contributions, pitfalls, and gaps yet to be filled.

### Introduction

The right of reproduction was one of the first exclusive rights introduced by national copyright laws.<sup>1</sup> The entitlement is commonly defined as the “core” of copyright<sup>2</sup> and at the heart of its conceptualization.<sup>3</sup>

From the early-days printing privileges to the classic right to prevent material duplications, reproduction has always been the first entitlement to face the challenges raised by technological developments and the broadening of the subject matter of copyright. With an acceleration in the 20<sup>th</sup> century, new devices have made copying cheaper, faster and available for any user. Format

---

\* Associate Professor of Comparative Private Law, Scuola Superiore Sant'Anna, Pisa (Italy). Email: [c.sganga@santannapisa.it](mailto:c.sganga@santannapisa.it). ORCID ID: <https://orcid.org/0000-0002-5836-1824>.

<sup>1</sup> Already the Statute of Anne recognized to authors the ‘sole Liberty of Printing and Reprinting’ their books (An Act for the Encouragement of Learning, 8 Anne c.19 (1719), and so did the French Act of 1793 (Decret-loi du 1er septembre 1793 sur la propriété littéraire et artistique, in (1893) 11 *Le Droit D’Auteur* 131) and the Prussian Act of 1837 (as reprinted in (1988) 107 *UFITA* 190).

<sup>2</sup> Commission, Green Paper ‘Copyright and Related Rights in the Information Society’ COM(95) 382 final, 49.

<sup>3</sup> See, similarly, Ansgar Ohly, ‘Economic rights’, in Estelle Derclaye (eds) *Research Handbook on the Future of EU Copyright* (Elgar, 2008), 212., and Michel M Walter, Silke von Lewinski (eds) *European Copyright Law. A Commentary* (OUP, 2010) 963.

shifting has become common. Ultimately, the digitization of protected works and the internet have drastically broadened the range of conducts involving reproductions, and particularly temporary ones.<sup>4</sup> Against this background, adopting a purely technical definition of the boundaries of the right could have resulted in the construction of an overstretched right, and in the privatization of almost every conduct involving digital works, regardless of its impact on rightholders' economic interests. Not unexpectedly, the policy debate regarding the 'right' approach to digital uses became soon heated, triggering a panoply of different reactions at an international, EU, and national level alike.

Despite the relevance of this right in the digital environment, the first international conventions regulating digital copyright and related rights – the 1996 WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)<sup>5</sup> – did not intervene on it, referring back to the relatively “old” definition provided by the Berne Convention.<sup>6</sup> The Agreed Statement to Article 1(4) WCT justified the omission by arguing that the international *acquis* was already equipped with provisions that could be adapted to the features of digital works.<sup>7</sup> Yet, too many questions were left unsolved, and with them the obvious risk of fragmentation of national responses to new technological developments.

On the contrary, the EU legislator perceived since the early days the need to harmonize exclusive rights and create a common vocabulary that could flatten the divergences in Member States' approaches. Despite the common adhesion of EU countries to the Berne Convention, in fact, national statutes differed as to the approach to the rights – from very broad categories to very detailed lists<sup>8</sup> -, the terminology used, and the conducts covered by each entitlement.<sup>9</sup> From the Software Directive I (1991)<sup>10</sup> on, the EU harmonization has created a broad *acquis communautaire* characterized by a piecemeal approach, drawing upon international and national definitions, while the Court of Justice of the European Union (CJEU) has progressively construed autonomous concepts of EU (copyright) law, narrowing ever more the space left to national legislators.

---

<sup>4</sup> This is well emphasized in Green Paper Copyright (n 2), 51, and already in Commission, Green Paper 'Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action', COM(88) 172 final, 7-8.

<sup>5</sup> WIPO Copyright Treaty, 36 ILM 65 (1997); WIPO Performances and Phonograms Treaty, 36 ILM 76 (1997).

<sup>6</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986)

<sup>7</sup> *Agreed Statements concerning the WIPO Copyright Treaty, adopted by the Diplomatic Conference of December 20, 1996, Concerning Article 1(4)*, <[http://www.wipo.int/treaties/en/text.jsp?file\\_id=295456](http://www.wipo.int/treaties/en/text.jsp?file_id=295456)>, accessed 5 July 2020.

<sup>8</sup> It is common to compare the French tradition, flanked by that of countries such as Finland or Hungary, characterized by broad definitions, with approaches such as those of the UK Copyright, Design and Patents Act, where rights are defined in analytical detail. See Mireille van Eechoud et al, *Harmonizing European Copyright Law. The Challenges of Better Lawmaking* (Wolter Kluwer 2009) 68.

<sup>9</sup> *Ibid*, noting how the distribution of tangible copies is classified in some countries as part of the right of communication to the public, in others as part of the reproduction right, in yet others under a general “making available” right.

<sup>10</sup> Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L122/42 (Software Directive I).

The InfoSoc Directive<sup>11</sup> attempted to conclude the path started by the Software and Database Directives and to provide a comprehensive, clear and updated definition of the right of reproduction.<sup>12</sup> However, its text was already born aged,<sup>13</sup> and destined to create interpretative challenges. The broad definition provided by Article 2 InfoSoc and the uncertain scope of the exception of transient reproduction (Article 5(1) InfoSoc) triggered great uncertainties as to the extent of rightholders' control over a wide range of digital uses, transmissions and processes, factually increasing the number of restricted acts.<sup>14</sup> Scholars and stakeholders soon showcased their fears that an overstretched reproduction right could disproportionately impact on the functioning of the internet, have chilling effects on the development of new digital distribution models, and improperly cover acts of consumption and reception of information.<sup>15</sup> National courts have struggled with the classification of acts such as caching, linking, streaming, search engine indexing and thumbnailing, with the overlap of rights of reproduction and communication to the public, and with the definition of the borders of partial reproduction *vis-à-vis* activities such as music sampling.<sup>16</sup> Rightholders and collecting societies have claimed multiple remunerations for single transmissions and from multiple actors in the digital transmission chain, for instance for the copies made both at the beginning (on the server) and at the end (on the user's device) of the communication.<sup>17</sup>

Commentators and policy makers have long called for the adoption of a normative – rather than technical – approach to the right of reproduction, in order to include within its scope only those conducts that have a functional and economic impact on rightholders' interests, and not every act that could be technically defined as a reproduction.<sup>18</sup> Yet, courts have rarely followed this path in a consistent fashion. At the same time, the very general and broad formulation of Article 2 InfoSoc and its uncertain relationship with the correspondent provisions in the Software and Database Directive have engendered a number of systematic questions, leading to several interventions by the CJEU, which have substantially reshaped the scope of the right in the past two decades.

This chapter will offer an overview of the path that has led to the definition of the scope of the right of reproduction at an international and EU level. Then, it will comment on the evolution

---

<sup>11</sup> Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (InfoSoc Directive).

<sup>12</sup> See Commission, Explanatory Memorandum to the Proposal for a Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, COM(97) 628 final, 13.

<sup>13</sup> As noted by Martin Kretschmer, 'Digital Copyright: the End of an Era' (2003) 25 EIPR 333, 335.

<sup>14</sup> See, similarly, van Eechoud et al (n 8), 75.

<sup>15</sup> This is the reason why during the negotiations for the WCT several countries advocated for a complete exclusion of temporary reproductions from the scope of the right. See Records of the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions (1996) WIPO Publication 348, docs CRNR/DC/22, CRNR/DC/53, CRNR/DC/53, CRNR/DC/56, CRNR/DC/73 containing amendments for a carve out on the reproduction right by Norway, Australia, a coalition of thirty African States, and a coalition of 20 Latin American States.

<sup>16</sup> Several cases are reported and commented on by van Eechoud et al (n 8), 84-87. See also Mark Turner, Dominic Callaghan, 'You Can Look But Don't Touch! The Impact of the Google v Copiepresse Decision on the Future of the Internet' (2008) 30 EIPR 34.

<sup>17</sup> Walter-Von Lewinski (n 3), 965.

<sup>18</sup> See, e.g., Legal Advisory Board (LAB), Reply to the 1995 Green Paper on Copyright and Related Rights in the Information Society, Brussels, 20 November 1996. On the need for a normative approach to the notion, see Bernt Hugenholtz, Kamiel Koelman, 'Copyright Aspects of Caching: Digital Intellectual Property Practice Economic Report, Amsterdam, Institute for Information Law, 1999, 2.

that the notion and its-subcategorization have witnessed from 2001 on in the CJEU case law, with particular attention to general definitions, temporary reproductions and related exceptions, partial reproduction, format shifting and adaptation, and private copying and other exceptions. It will conclude by providing some remarks on strengths pitfalls, and gaps yet to be filled.

## **The right of reproduction in legislative texts**

### ***International background and preparatory works***

The exclusive right of reproduction was first harmonized at an international level by the Berne Convention (BC), in occasion of its Stockholm and Paris revisions (1967-71). As testified by preparatory works, its late introduction was not a sign of lack of convergence around the notion and scope of the right, but was rather caused by disagreements among national delegations on the scope of its exceptions.<sup>19</sup> In fact, the right was taken for granted by all the States members of the Berne Union, and almost identically regulated by the respective national statutes.<sup>20</sup>

Article 9 BC attributes to authors of literary and artistic works “the exclusive right of authorizing the reproduction of these works, in any manner or form” (Article 9(1)). It considers as reproduction “any sound or visual recording” (Article 9(2)), and subordinates the introduction of national exceptions to the three-step test (Article 9(3)). Compared to earlier copyright acts, the Convention makes a step forward and covers not only reprinting but any form of reproduction, including both direct and indirect forms and format shifting, as confirmed by the fact that Article 9 does not distinguish between original first fixation and subsequent copies of the work.<sup>21</sup> The distinction is present, instead, in national legislations and international texts. In the Rome Convention,<sup>22</sup> for instance, Articles 7(b) and 13(a) attribute, respectively to performers and broadcasting organizations, the right to prevent the unauthorized fixation of their unfixed performance, while Articles 7(c) and 13(c) grant them the right to prevent the unauthorized reproduction of a fixation of their performance or broadcast, but only if the original fixation was made without their consent, or if the reproduction was made for a purpose different from those for which they consented or the exception was granted.<sup>23</sup> On the contrary, producers of phonograms enjoy only the right to prevent direct and indirect reproductions (Article 10 RC), since the act of fixation is a prerequisite for protection and does not amount to an independent right.

---

<sup>19</sup> As reported by Sam Ricketson and Jane Ginsburg, *International Copyrights and Neighboring Rights. Berne Convention and Beyond*, vol 1 (2<sup>nd</sup> ed, OUP 2006), 622.

<sup>20</sup> See Michel M Walter, in Michel M Walter (ed) *Europaisches Urheberrecht, Kommentar* (Springer 2001), para 47; Dietrich Reimer and Eugen Ulmer, ‘Die Reform der materiellrechtlichen Bestimmungen der Berner Ubereinkunft’ (1967) GRUR Int 431, 433.

<sup>21</sup> The inclusion is specified in the General Report of the 1971 Diplomatic Conference of the Berne Union. The text is reported and commented on in Ricketson-Ginsburg (n 19) 626.

<sup>22</sup> International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, UN Treaty Series vol 496, 43.

<sup>23</sup> Article 7(c)(iii) includes also the case when the fixation, albeit unauthorized, was made in accordance to the exceptions provided under Article 15 RC, but the reproduction was till made for purposes different from those referred to in the latter provision.

This was the background against which the European Commission (EC) kicked off its consultation on the need to harmonize copyright in the internal market in 1995, with the ‘Green Paper on Copyright and Related Rights in the Information Society’.<sup>24</sup> Analyzing the reproduction right, the Green Paper emphasized how digital technologies caused yet another revolution after the introduction of reprography technologies, which were the first to increase the risk of large-scale unauthorized copying and to trigger legislative reactions in the form of *ad hoc* exceptions to the right of reproduction and related compensation schemes.<sup>25</sup> For the Commission, the digitization of works required the concept of reproduction to be reviewed, in line with the solutions adopted by the Software Directive I, which extended the definition to cover ordinary uses (digitization, intermediate copies, downloading into main memory) and thus also temporary acts.<sup>26</sup> However, rather than focusing on the definition of the scope of the right *vis-à-vis* new digital forms of exploitation, the Green Paper emphasized the need to rethink the regulation of private copying via statutory licensing and equitable remuneration, in light of the possibility offered by digital technologies to control and prevent access and copy. This circumstance, together with the high degree of fragmentation of exceptions among Member States, led the Commission to prioritize the intervention on the limitations to reproduction against the harmonization of its definition.<sup>27</sup>

In the Follow-up to the Green Paper (1996),<sup>28</sup> the EC concluded for the necessity to set out the content of the right on the basis of the *acquis communautaire*, covering digitization and other acts such as scanning, uploading, downloading, transient and other ephemeral acts of reproduction.<sup>29</sup> The most important matters to be addressed remained, however, the harmonization of private copying and, more generally, of exceptions to reproduction in the digital environment, framed in light of their economic impact under Article 9(2) BC.<sup>30</sup> Neither the TRIPs Agreement nor the WCT intervened on the right of reproduction, requiring only compliance with Articles 1 to 21 BC.<sup>31</sup> As made explicit in the Agreed Statement on Article 1(4) WCT, the drafters of the WCT believed that existing international rules were already wide enough to cover reproductions in the digital environment.<sup>32</sup> On the contrary, the WPPT partially modified the approach of the Rome Convention, by making unconditional for performers and phonogram producers the right of direct and indirect reproduction, in any manner or form, of their fixed performance (Article 7) and of their phonograms (Article 11). Performers were granted also, as in the Rome Convention, the right of first fixation (Article 6).

This was the basis on which the EU legislator constructed concept, scope and structure of the right of reproduction,<sup>33</sup> helped, in the past two decades, by the CJEU.

---

<sup>24</sup> COM(95) 382 final.

<sup>25</sup> *ibid* 49.

<sup>26</sup> *ibid* 50, 52.

<sup>27</sup> *ibid* 52. The questions submitted for consultation, in fact, were whether digitization and private copying should be covered by reproduction, to which extent, and subject to which exceptions and/or remuneration schemes.

<sup>28</sup> Commission, ‘Follow-up to the Green Paper on copyright and related rights in the Information Society’, COM (96) 586 final.

<sup>29</sup> *ibid* 11.

<sup>30</sup> *ibid* 12

<sup>31</sup> Article 9 TRIPs; Article 1(4) WCT.

<sup>32</sup> Agreed Statements (n 7)

<sup>33</sup> Explanatory Memorandum to the Proposal for a Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, COM(97) 628 final.

## *The scope of the right of reproduction in EU directives*

The first mention of the right of reproduction can be found in Article 4(2) Software I (1991), which follows the text of the Berne Convention, specifying that the right covers both permanent and temporary reproductions of the work, in any manner or form, in part or in whole. In fact, the provision did not introduce any substantial innovation. Temporary reproductions were meant to be included also under Article 9(1) BC, according to the General Report to the Convention, while the extension of the exclusivity to parts of a work was commonly accepted among Member States, albeit to different extents.<sup>34</sup> However, the new definition triggered fears of overprotection. Article 1(3) Software, in fact, covers any part of the work which is original by itself, and the Directive sets a very low originality benchmark to grant protection. As a result, commentators flagged the risk that even the smallest reproduction, if showing basic individuality, could amount to an infringement, with obvious distortive effects.<sup>35</sup>

While it was clear that the right covered reproductions on different supports and means, before the enactment of that directive, Member States diverged on the treatment of the mere running of a program on a computer.<sup>36</sup> To tackle the problem, Article 4(2) Software I extended the notion to include also reproductions necessary for “loading, displaying, running, transmission or storage” of the software, using a broad concept akin to the Anglo-American tradition rather than to the continental European approach.<sup>37</sup> By this move, and more generally by the inclusion of temporary reproductions, that directive wanted to make sure that all utilizations of the programs which may damage a rightholder’s interest remain under their control, regardless of their type.<sup>38</sup>

A few years later, the Database Directive<sup>39</sup> included among the exclusive rights granted over the original selection or arrangement of content of a database the right to carry out or authorize its temporary or permanent reproduction by any means and in any form, in whole or in part (Article 5(a)). As also underlined in the Explanatory Memorandum, a mere reproduction of part of the database content does not constitute infringement, although the border between this conduct and the partial reproduction of the database selection or arrangement might be hard to assess.<sup>40</sup> The EU legislator omitted to address other questions, such as the definition and regulation of transient reproductions. Yet, scholars have argued that the legislative intention to have the latter covered by Article 5(a) Database clearly emerge, *a contrario*, from the broad notion of “temporary” and the introduction of a specific exception for lawful uses under Article 6(1)

---

<sup>34</sup> Ricketson-Ginsburg (n 19) 626.

<sup>35</sup> Walter Blocher, Michel Walter, ‘Computer Program Directive, Article 4’, in Walter-von Lewinski (n 3) 81, 126.

<sup>36</sup> Ibid. See also the analysis provided by Michel Vivant, ‘Copyrightability of Computer Programs in Europe’, in Alfred Meijboek, Corien Prins (eds), *The Law of Information Technology in Europe* (Deventer, 1992) 103, 111.

<sup>37</sup> A number of EU countries belonging to the continental tradition, in fact, showed a cautious and narrow approach to the definition of what amounted to temporary reproduction when the functioning of the software was involved. This is also noted by Blocher-Walter (n 35) 129. The act of loading without reproduction is thus excluded from the scope of Article 4(a) Software I.

<sup>38</sup> See Explanatory Memorandum (n 33), part 2, note on Article 4(1)(a).

<sup>39</sup> Directive 96/9/EC of the European Parliament and the Council of 11 March 1996 on the legal protection of databases OJ L77/20 (Database Directive).

<sup>40</sup> Explanatory Memorandum (n 33) part 2, para 5.

Database.<sup>41</sup> This interpretation would be confirmed by the fact that Article 5(1) InfoSoc, which introduced the general mandatory exception for transient reproductions, has not been extended to cover the subject matter of Directive 96/9/EC.<sup>42</sup>

In 2001 the InfoSoc Directive complemented the definitions inherited from previous directives with the notion of “direct or indirect” reproduction,<sup>43</sup> and merged them into a unitary horizontal definition (Article 2) which should be given a broad interpretation (Recitals 9, 10 and 21 InfoSoc). The inclusion of indirect reproductions was meant to stretch rightholders’ control to cover also copies made not from the original copy of the work but via different means or channels (e.g., fixation or recording of works communicated to the public, broadcast etc). The resulting broad definition opts for a technical – rather than functional – identification of what amounts to reproduction, with the aim of controlling every use of the work that requires making a copy of it, regardless of its economic or functional meaning.<sup>44</sup>

In line with international texts, Article 2 InfoSoc included reproductions “in any manner or form”. This allows covering also the digitization of works and their storage, as requested by the Agreed Statement to Articles 1(4) WCT and 7, 11 and 16 WPPT. More problematic is, instead, the inclusion of any reproduction “in whole or in part”. In fact, since individual fragments are subject to copyright only if they meet the originality threshold required for protection, it is not unreasonable to infer – as indeed the CJEU did in 2009<sup>45</sup> – that an infringement of Article 2 InfoSoc may take place only if the object of the partial reproduction is original enough to represent the author’s own intellectual creation. This implies an inevitable connection of the notion of partial reproduction with that of protected work. However, while the latter concept is defined – with different levels of detail – by national copyright laws, the EU legislator explicitly decided to leave it out from the harmonization pursued with the InfoSoc Directive.

Unsurprisingly, the breadth of such a systematic gap forced the CJEU, as we will see below, to intervene on the matter (relatively) soon after the entry into force of the InfoSoc Directive.<sup>46</sup>

In an effort to reach a full horizontal harmonization, Article 2 InfoSoc also standardized the reproduction right for authors, performers, phonogram producers, producers of first fixation of films, and broadcasting organizations.<sup>47</sup> The decision to assimilate copyright and related rights *vis-à-vis* reproduction departs from the continental tradition and the approach of international

---

<sup>41</sup> E.g., Silke von Lewinski, Database Directive. Article 5’, in Walter-von Lewinski (n 3), 678, 716. See also Mathias Leistner, ‘Der neue Rechtsschutz des Datenbankherstellers’ (1999) GRUR Int 819, 822.

<sup>42</sup> This has been defined inconsistently by the Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, SEC(2004) 995, 7-8.

<sup>43</sup> As clarified by preparatory works, the inclusion of indirect reproductions was only meant to clarify the boundaries of the right, which already covered such forms under previous directives (ibid 5-6). But contra Bernt Hugenholtz et al., *The Recasting of Copyright and Related Rights for the Knowledge Economy*. Report to the European Commission, DG Internal Market (2006), 54.

<sup>44</sup> *ibid* 47.

<sup>45</sup> In Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] EU:C:2009:465.

<sup>46</sup> *Ibid*.

<sup>47</sup> In line with this decision, Article 11(a) InfoSoc explicitly repeals Article 7 of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L346/61 (Rental Directive I), which regulated the right of reproduction for performers, producers of phonograms and broadcasting organizations.

texts,<sup>48</sup> but does not go as far as to also eradicate the distinction between the right of reproduction and the right of first fixation,<sup>49</sup> which has been rightly labelled as artificial,<sup>50</sup> unnecessary and confusing.<sup>51</sup> The result of this persisting dichotomy is a bifurcation in the meaning that “reproduction” has for authorial and entrepreneurial works.<sup>52</sup> In fact, authors are protected against any reproduction of the work, while producers only against reproductions – identical or at least identifiable - of the fixation, which prevents them from objecting to acts of copying that do not use recording. The consequences of such a distinction has been manifold, the most telling example being the different definition of the minimum amount of work to be copied in order to have an infringement, as in the case of sound sampling.<sup>53</sup> While several national courts have excluded that an author’s right of reproduction was violated when the sampling was too short to reach the minimum originality/individuality required for protection, the absence of such a threshold in the case of producer’s rights made other courts and commentators rule in favour of an absolute protection of any fragment of the phonogram, with no *de minimis* exclusion.<sup>54</sup> Also in this area, not unexpectedly, the CJEU had to intervene to put an end to the judicial *querelle*.<sup>55</sup>

### *Exceptions and limitations*

To limit the risk of distortion and overprotection, the regulation of the right of reproduction was complemented by a number of tailored exceptions and limitations. The Software and Database Directives provide that specific acts of reproduction are not subject to the authorization of the rightholder, respectively if they are necessary for the use of the software by the lawful acquirer in line with its intended purpose (Article 5(1) Software), or if they are finalized to the lawful user’s access to and normal use of the content of the database (Article 6(1) Database).

Mirroring the exceptions for lawful uses, Article 5(1) InfoSoc aims at tackling the “problematic and unintended effects”<sup>56</sup> created by the protection of temporary reproductions in the digital

---

<sup>48</sup> On the point see Silke von Lewinski, *International Copyright Law and Policy* (OUP 2008), 975.

<sup>49</sup> Article 6 Rental, in fact, was not repealed by the InfoSoc Directive.

<sup>50</sup> By Ohly (n 3) p.204.

<sup>51</sup> Von Lewinski-Walter (n 3) p.977

<sup>52</sup> For similar observations see Lionel Bently, Brad Sherman, *Intellectual Property Law* (2<sup>nd</sup> ed. OUP 2004) 136-137.

<sup>53</sup> On the importance of sampling in the debate on the scope of the right of reproduction see Bernd Justin Jütte, Joao Quintais, ‘Advocate General Turns down the Music – Sampling Is Not a Fundamental Right under EU Copyright Law’ (2019) 41 EIPR 654.

<sup>54</sup> See the debate reported by Ohly (n 3) 203-205.

<sup>55</sup> In Case C-476/17 *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] EU:C:2019:624.

<sup>56</sup> This was the aim underlying the introduction of a similar exception in the basic negotiation text discussed at the WIPO Diplomatic Conference of 1996, which produced the WCT and WPPT. In the Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference (WIPO doc CRNR/DC/4 of 30 August 1996) the broad definition of the right of reproduction in Article 7(1), including also temporary reproduction, was flanked in Article 7(2) by a limitation for “cases where a temporary reproduction has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the work that is authorized by the author or permitted by law”. The text was amended multiple times, with the EU delegation proposing changes that would have later flown into the InfoSoc Directive. However, since the positions on the exception were irreconcilable, the entire Article 7 was crossed out from the draft treaties, resulting in the omission of the right of reproduction from the WCT and WPPT. For a detailed analysis of the negotiation process and the draft



environment. The risk underlined by several commentators and stakeholders was that a very wide array of acts of temporary reproductions having no economic and functional meaning, but being essential for the functioning of the internet and for lawful uses such as digital processing and transmission of works would have improperly submitted to rightholders' control and authorization, with obvious chilling effects on technological development.

Instead of limiting the scope of the right of reproduction internally, the EU legislator decided to still cover all temporary reproductions under Article 2 InfoSoc, and to provide a specific exception for transient or incidental reproductions which are an integral and essential part of a technological process, having the only purpose of enabling the lawful use of a work or other subject matter,<sup>57</sup> or its transmission in a network between third parties and an intermediary, and having no independent economic significance.<sup>58</sup> This decision subordinates the application of the provision to the three-step test (Article 5(5) InfoSoc), thus increasing the relevance of the economic impact of the reproduction on the normal exploitation of the work to decide on its admissibility.

Article 5(1) is the only mandatory exception provided by the InfoSoc Directive. It does not apply to software programs and databases, the lawful uses of which are already regulated by the respective directives. Its scope is limited to temporary reproductions which should be either transient, that is of particularly short duration, or incidental, that is contextual and linked to another principal use, and with no independent meaning. Reproductions should also be inseparable from the technological process they are part of, and be essential to carry it out successfully.<sup>59</sup> Common examples, also mentioned in Recital 33 InfoSoc, are caching and reproductions that enable the act of browsing or other transmission systems to work efficiently.<sup>60</sup> The directive further restricts the scope of the exception by limiting it to acts that have the sole purpose of realizing an internet transmission by an intermediary, or the lawful use of a work, that is – as clarified by Recital 33 InfoSoc - where the use “is authorized by the right holder or not restricted by law”. Recital 33 InfoSoc also specifies that intermediaries should not modify the information transmitted nor interfere with the lawful use of technology, and that they remained privileged even if the information conveyed is unlawful.<sup>61</sup> The presence of any additional goal for the reproduction, even if collateral, excludes the application of the exception.

---

texts, see Jorge Reinbothe, Silke von Lewinski, *The WIPO Treaties on Copyright* (2<sup>nd</sup> ed, OUP 2015), esp Annex to Art 1(4) WCT, Nos 9-13.

<sup>57</sup> The term refers to all the matters covered by Article 2 InfoSoc, i.e., works, fixed performances, original and copies of films, phonograms, and fixation of broadcasts. See Walter-von Lewinski (n 3) 1026.

<sup>58</sup> The decision was in line with the position adopted by the EU delegation at the WIPO Diplomatic Conference 1996. Not all Member States immediately followed this approach, though. See, e.g., Article 13a of the Dutch Copyright Act, which implements Article 5(1) InfoSoc in the context of the definition of the reproduction right instead that as an exception. See Lucie Guibault, Guido Westkamp, Thomas Rieber-Mohn, ‘Study on the Implementation and Effect in Member States’ Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society’, Report to the European Commission, February 2007. 349-350.

<sup>59</sup> Recital 33 refers to “acts (...) which enable transmission systems to function efficiently”.

<sup>60</sup> As also specified by Recital 33 InfoSoc. For a comment on the requirements set by Article 5(1) InfoSoc and their national implementations see Guibault et al (n 57), 32-33.

<sup>61</sup> It should be noted that the exception provided by Article 5(1) InfoSoc refers only to acts of reproduction made by intermediaries, while any other matter regarding their liability remains regulated by the E-Commerce Directive (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of

Every requirement, in fact, points to the accessory function of the reproduction as the most characterizing element to distinguish exempted from forbidden acts. Their definitions, however, are quite concise and generally left in haze. In light of the substantial impact of temporary reproductions on the degree of rightholder's control over the work and on basic technological processes, it comes as no surprise that the uncertainties surrounding the scope of Article 5(1) InfoSoc has triggered a wide array of CJEU rulings in recent times.<sup>62</sup>

Another area which has heavily engaged the Court is the definition of the scope of Article 5(2)(b) InfoSoc, introducing the non-mandatory private copying exception, and particularly the notion of fair compensation. The need to harmonize the provision was highlighted as a policy priority by key preparatory documents,<sup>63</sup> and finally materialized in the InfoSoc Directive. Article 5(2)(b) applies to any medium,<sup>64</sup> analogue or digital,<sup>65</sup> and covers all reproductions that are made by a natural person for non-commercial purposes. In this sense, it partially overlaps with the reprography exception of Article 5(2)(a), which covers reproductions on paper or similar analogue medium,<sup>66</sup> but its application prevails as *lex specialis*.<sup>67</sup> The definition of private use is more restrictive and less encompassing than the notion "personal use" provided by some national exceptions,<sup>68</sup> since it is limited to strictly private activities, thus excluding other personal uses having professional or commercial nuances. At the same time, the obligation to provide a fair compensation excludes the discretion of Member States with regard to the gratuitous or onerous nature of the exception, while Recital 35 InfoSoc still offers some room for national legislators to decide on the categories of rightholders which could benefit from such schemes. Member States have also broad discretion in defining the establishment, management, enforcement, distribution of fair compensation schemes and the amount of compensation due, as long as the factors enshrined in Recital 35 InfoSoc are taken into account. The reference goes to the particular circumstances of the case, the "possible harm to the rightholders resulting from the act in question", the fact that rightholders have already received a payment or if the prejudice would be minimal, and the degree of use of technological measures used, the latter being also mentioned in the text of the provision.<sup>69</sup> While most of the criteria have been easily embedded

---

information society services, in particular electronic commerce, in the Internal Market, [2000] OJ L178/1, Articles 12-14)

<sup>62</sup> See *infra*, ...

<sup>63</sup> Abundantly in Green Paper Copyright and Related Rights in the Information Society (n 2) 51. The need to harmonize national levy systems within the Single Market was also emphasized recently by the Vitorino Report, requested by Commissioner Barnier and presented in 2013. After months of stakeholders' dialogue, Vitorino formulated articulated recommendations to reconcile current levy systems with the free movement of goods and services. None of them were included in the Digital Single Market reform.

<sup>64</sup> The original proposal was limited to audio, visual and audiovisual recording media to distinguish the provision from Article 5(2)(a), as testified by the text of Recital 38, which still presents that limitation, later eliminated from the cogent text of the Directive.

<sup>65</sup> As suggested by the interplay between Article 5(2)(a) and (b) InfoSoc. See Stefan Bechtold, in Thomas Drier, Bernt Hugenholtz (eds) *Concise European Copyright Law* (OUP 2006) 375.

<sup>66</sup> On this matter see von Lewinski-Walter (n 7) 1029-1030.

<sup>67</sup> *ibid* 1032, noting how the conditions in Article 5(2)(b) are more restrictive and that it would not be appropriate to regulate exceptions for private copying differently depending on the medium involved.

<sup>68</sup> It may be questioned, in fact, whether such national exceptions are compliant with EU law. See, e.g., §53(2) of the German Copyright Act, which covers also scientific uses, building of personal archives, collection of personal information concerning daily news etc.

<sup>69</sup> See, however, the decision of the High Court of England and Wales in *BASCA v The Secretary of State for Business, Innovation and Skills*, [2015] EWHC 1723, which intervened to censure the discretion exercised by the UK

into national legislations, others have been heavily criticized as alien to the continental tradition, the most paradigmatic case being that of the notion of “harm” and its clash with the remuneration right used in civil law countries, for which actual damages to rightholders’ interests are irrelevant.<sup>70</sup>

The large discretion left to Member States triggered a flow of cases before the CJEU, which had the opportunity to build an entire doctrine on the notion of “fair” under Article 5(2)(b). Also the EU Commission perceived the negative impact of the pitfalls created by the fragmentation of national solutions, running several consultation with stakeholders, and focusing amply on the matter in the Public Consultation on the Modernization of EU copyright rules.<sup>71</sup> Yet, no intervention on the provision seems to be in the pipeline for the next future, overcome by more pressing reform goals.<sup>72</sup>

Article 5(2) InfoSoc includes a long list of optional exceptions to the right of reproduction, introduced unevenly by Member States. More recently, the Orphan Works Directive and the Marrakesh Directive have complemented the wide menu with two mandatory exceptions for the purpose of, respectively, allowing the digitization of works with no known author by cultural heritage institutions, and the production of works in accessible format for visually disabled individuals.<sup>73</sup> In the very last Directive on Copyright in the Digital Single Market (CDSMD), the EU legislator has again provided for three new mandatory exceptions (also) on the right of reproduction, oriented to facilitate text and data mining for scientific purposes, online teaching activities, and digitization directed to the preservation of collections.<sup>74</sup> Along the same line of simplification and smoothening of national divergences, Article 16 CDSMD has clarified that the transfer or licence of the right of reproduction to a publisher constitutes sufficient legal basis for the latter to be entitled to a share of the fair compensation due to the author under an exception

---

government in excluding the payment of fair compensation on the basis of the fact that (i) the private copying exception was so narrowly designed that it caused only a minimal harm to rightholders (Recital 35 InfoSoc) and (ii) levies would be “inefficient, bureaucratic and unfair, and disadvantage people who pay for content”. In fact, the High Court did not exclude the possibility for the legislator to cross out levies, but required stronger evidence to support the choice. Brexit has now excluded the possibility to have the question solved by the CJEU. See Thomas Dillon, ‘Evidence, policy and ‘evidence for policy’’ (2016) 11(2) JIPLP 92.

<sup>70</sup> Likewise Silke von Lewinski, ‘Stakeholder Consultation on Copyright Levies in a Converging World – Answers of the Max-Planck-Institut’ (2007) 38 IIC 65, 66.

<sup>71</sup> The document, not available anymore on the website of the Commission, could be retrieved at [https://wiki.wikimedia.it/images/7/74/Consultazione\\_europea\\_sul\\_diritto\\_d%27autore.pdf](https://wiki.wikimedia.it/images/7/74/Consultazione_europea_sul_diritto_d%27autore.pdf) (last accessed 5 July 2020).

<sup>72</sup> As of today, “the Commission is currently not planning any action with respect to private copying levies. However, the Commission will continue the dialogue with all stakeholders”. See Answer given by Mr Breton on behalf of the European Commission to Question for written answer E-002342/20 to the Commission Henna Virkkunen, 20 July 2020, available at [https://www.europarl.europa.eu/RegData/questions/reponses\\_qe/2020/002342/P9\\_RE\(2020\)002342\\_EN.pdf](https://www.europarl.europa.eu/RegData/questions/reponses_qe/2020/002342/P9_RE(2020)002342_EN.pdf), accessed 26 July 2020.

<sup>73</sup> Directive 2012/28/EU of 25 October 2012 on certain permitted uses of orphan works [2012] OJ L299/5; Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled [2017] OJ L 242/6.

<sup>74</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/125 [CDSMD], Arts 3-5.

or limitation, thus superseding the CJEU decision in *Reprobel*, which reached the opposite conclusion under Article 5(2)(b) InfoSoc.<sup>75</sup> It would go beyond the scope of this chapter to analyze these interventions in detail. Suffice it here to note that their patchwork introduction in time and across Member States have caused the right of reproduction to have an uneven, fragmented scope across the Union. The CJEU has started to smoothen the most evident divergences with its harmonizing intervention, and the mandatory nature of the most recent exceptions introduced by the EU legislator suggests that the path towards a more harmonized framework has finally been open. Yet, the road ahead is still, and inevitably so, very long.

## **CJEU case law**

### *General principles and definitions*

The number of CJEU decisions intervening to clarify the general definition of the right of reproduction under Article 2 InfoSoc is relatively limited. Part of them focus on the characteristics of the entitlement, while a large number of cases use the reference to Article 2 InfoSoc as a tool to construct the notion of protected work in EU copyright law, which misses in the InfoSoc Directive but present, instead, in sector-specific acts such as the Software and Database Directive.

*Infopaq*<sup>76</sup> is the first decision that elaborates on the main features of Article 2 InfoSoc, qualifying the right of reproduction, as any other right protected by the InfoSoc Directive, as an autonomous concept of EU law, which should be given a uniform and broad interpretation in line with Recital 9. Seven years had to pass, instead, until the Court could finally articulate its interpretation of Article 2 in more detail in *Soulier and Doke*.<sup>77</sup>

The case concerned the legitimacy of the French Intellectual Property Code provisions introducing a mandatory collective licensing scheme for out-of-commerce works. The scheme attributed to approved collecting society the right to authorize the reproduction and communication in digital form of out-of-print books matching certain requirements, while allowing authors and their successors in title to oppose under specific conditions the practice. The CJEU ruled that the features of the mechanism envisioned by the French legislator were incompatible with the protection requested by Articles 2 and 3 InfoSoc, and took the opportunity to specify that the high level of protection to be granted to the right of reproduction (and the right of communication to the public) is not limited to their static enjoyment but covers also their exercise.<sup>78</sup> Both rights were defined as “preventive in nature, in the sense that any reproduction or communication to the public of a work by a third party requires the prior consent of its

---

<sup>75</sup> In Case C-572/13 *Hewlett-Packard Belgium SPRL v Reprobel SCRL* [2015] EU:C:2015:750, para 49, the CJEU ruled that Article 5(2)(a) and Article 5(2)(b) InfoSoc precluded national legislations to allocate a part of the fair compensation payable to rightholders to publishers, particularly where publishers were under no obligation to ensure that authors benefitted, even indirectly, from some of the compensation of which they have been deprived.

<sup>76</sup> *Infopaq*, paras 27-29.

<sup>77</sup> Case C-301/15, *Marc Soulier and Sara Doke v Premier ministre and Ministre de la Culture et de la Communication* [2016] EU:C:2016:878.

<sup>78</sup> *ibid* para 31. According to the Court, the interpretation would be backed by Article 5(2) of the Berne Convention (para 32), which is binding on the Union and requires that the enjoyment and the exercise of the rights of reproduction and communication to the public may not be subject to any formality.

author”.<sup>79</sup> The decision gave key relevance to the notion of prior consent as fundamental aspect of copyright protection, and referred it only to authors,<sup>80</sup> with national legislators being free to grant certain rights or benefits to other parties provided that no harm is caused to the rights attributed by the Directive.<sup>81</sup> However, the Court admitted that the two provisions do not specify the way how such consent must be expressed, making it possible to admit an implicit consent to the extent this choice allows ensuring a high level of protection to rightholders (Recital 9 InfoSoc),<sup>82</sup> and does not impose any formality contrary to the Berne Convention.<sup>83</sup> The same reasoning recurs in other decisions like *Renckhoff*,<sup>84</sup> *Reha Training*,<sup>85</sup> *Stichting Brein*,<sup>86</sup> albeit with reference to the sole Article 3 InfoSoc.

More recently, the trio issued by the Grand Chamber in July 2019 (*Funke Medien*,<sup>87</sup> *Pelham*<sup>88</sup> and *Spiegel Online*<sup>89</sup>), renowned for their landmark contribution to the definition of the role of fundamental rights in EU copyright law, contributed to the definition of the scope of the right of reproduction under Article 2 InfoSoc, addressing the problem from the perspective of the discretion left to Member States. *Pelham* and *Funke Medien* defined the provision as a measure of full harmonization, for it “is not qualified by any condition, nor is it subject, in its implementation or effects, to any measure being taken in any particular form”.<sup>90</sup> This clarified that only the EU legislator and the CJEU are competent to define scope, content and structure of the right of reproduction, reinforcing the definition of reproduction as autonomous concept of EU law inaugurated in 2009.

Article 2 InfoSoc has been used as the main point of reference for the Court to define the general notion of protected work, absent an explicit legislative harmonization. The debut of the doctrine is marked by *Infopaq* (2009), where the Court was asked, *inter alia*, to determine whether the concept of “reproduction in part” under Article 2 InfoSoc covered also the storing and printing of an excerpt consisting of 11 words. Observing that the InfoSoc Directive does not define the concepts of reproduction and reproduction in part, the CJEU decided to derive them from the wording and context of Article 2 InfoSoc and in light of the objectives of the Directive and international law.<sup>91</sup> Since the provision makes it clear that the right of reproduction covers “work”,<sup>92</sup> the decision started from building the latter notion on the basis of a contextual

---

<sup>79</sup> The principle was already affirmed, albeit more implicitly, in *Infopaq*, paras 57 and 74; Joined Cases C-403/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* and C-429/08 *Karen Murphy v Media Protection Services Ltd* (FAPL) [2011] EU:C:2011:631, para 162.

<sup>80</sup> *Soulier and Doke*, para 47 (“the authors are the only persons to whom that directive gives, by way of original grant, the right to exploit their works”). See also case C-277/10, *Martin Luksan v Petrus van der Let* [2012] EU:C:2012:65, para 53.

<sup>81</sup> *Soulier and Doke*, para 48. See also *Reprobel*, paras 47-49.

<sup>82</sup> *Soulier and Doke*, para 37.

<sup>83</sup> *ibid* para 50.

<sup>84</sup> Case C-161/17, *Land Nordrhein-Westfalen v Dirk Renckhoff* [2018] EU:C:2018:634, para 29.

<sup>85</sup> Case C-117/15, *Reha Training v GEMA* [2016] EU:C:2016:379, para 30.

<sup>86</sup> Case C-610/15, *Stichting Brein v Ziggo BV and XS4All Internet BV* [2017] EU:C:2017:456, para 20.

<sup>87</sup> Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019] EU:C:2019:623.

<sup>88</sup> (n 54).

<sup>89</sup> Case C-516/17 *Spiegel Online GmbH v Volker Beck* [2019] EU:C:2019:625

<sup>90</sup> *Pelham*, paras 84-85; *Funke Medien*, para 87.

<sup>91</sup> *Infopaq*, paras 31-32.

<sup>92</sup> *ibid* para 33.

interpretation of the Berne Convention and the Database and Software Directives, identifying it in every piece that is original in the sense that it is its author's own intellectual creation.<sup>93</sup>

Along the same lines, in *FAPL* the Court was asked to determine whether Article 2(a) InfoSoc may cover the creation of transient sequential fragments of the work within the memory of a satellite decoder and on a television screen, and whether the judicial assessment should concern all the fragments as a whole or only those which exist at a given moment. Ruling once again that “reproduction” should be understood as an autonomous concept of EU law,<sup>94</sup> the CJEU recalled the principle expressed in *Infopaq*, concluding that “the unit composed of the fragments reproduced simultaneously – and therefore existing at a given moment” should be examined together in order to verify whether elements that are the expression of the author's own intellectual creation.<sup>95</sup>

Several cases returned to the point in the following years. *Painer* did it with regard to photographs, specifying that they constitute an intellectual creation if the author may express their creative abilities in their production by making free and creative choices, impressing a sort of “personal touch”.<sup>96</sup> The Court adopted the same principle to rule out the protectability of graphic user interfaces and, more generally, of those parts of the computer program or the preparatory design that are not capable of leading to the reproduction or creation of such programs (*BSA*<sup>97</sup>). This is also the case of the functionality of a software or the programming language and the format of data files used in order to exploit certain functions (*SAS Institute*).<sup>98</sup>

Subsequent decisions moved away from the extreme genericity of the notion of originality derived from the provision on the reproduction right, looking at the Berne Convention to integrate the definition of protected works under Article 2 InfoSoc with an additional criterion, which is that of representing an “expression” of the author's intellectual creation.<sup>99</sup> For the Court, this means that the work should be expressed in a manner that makes it identifiable with sufficient precision and objectivity, even if only in a transient form.<sup>100</sup> The expression is necessary to define with legal certainty the subject-matter protected, both *vis-à-vis* public authorities and private individuals, users or competitors.<sup>101</sup> Very recently, *Cofemel* followed suit, reiterating all the principles expressed in the previous case law and excluding that, in the field of design, the generation of a specific aesthetically significant visual effect is enough to create originality and thus to trigger copyright protection alongside the protection conferred by design rights.<sup>102</sup> In *Brompton*, ruling on the protectability of the features of a foldable bicycle, the Court clarified that originality may subsist also if its realization has been dictated by technical considerations, insofar as this has not prevented the author from expressing free and creative

---

<sup>93</sup> *ibid* paras 34-35.

<sup>94</sup> *FAPL*, para 154.

<sup>95</sup> *ibid* 155-156.

<sup>96</sup> Case C-145/10 *Eva-Maria Painer v Standard Verlags GmbH and Others* [2011] EU:C:2011:798, paras 88-90.

<sup>97</sup> Case C-393/09 *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury* [2010] EU:C:2010:816.

<sup>98</sup> Case C-406/10 *SAS Institute v World Programming Ltd* [2012] EU:C:2012:259.

<sup>99</sup> Case C-310/17 *Levola Hengelo BV v Smilde Foods BV* [2018] EU:C:2018:899, para 37

<sup>100</sup> *ibid* para 40.

<sup>101</sup> *ibid* para 41.

<sup>102</sup> Case C-683/17 *Cofemel – Sociedade de Vestuário SA v G-Star Raw CV* [2019] EU:C:2019:721, para 54.

choices in devising the shape.<sup>103</sup> Compared to the relative silence on the side of general definitions and the fragmented, unclear construction of the notion of protected work, the CJEU contributed much more effectively to the delineation of the scope of the reproduction right with other interventions, chiefly in the field of temporary, transient and partial reproductions.

### *Temporary reproduction and related exception(s)*

The notion of temporary reproduction under Article 2 InfoSoc has not been spelled out directly, but may be derived indirectly from the Court's construction of the scope of the mandatory exception of transient reproduction under Article 5(1) InfoSoc. The Court had the opportunity to intervene for the first time on the matter in *Infopaq*, where it had been called to decide whether the temporary reproduction necessary in a data capture process met the requirements set by Article 5(1) InfoSoc. After listing the five conditions,<sup>104</sup> the CJEU underlined how they should be understood as cumulative<sup>105</sup> and should be read strictly,<sup>106</sup> particularly in light of the three-step test and in accordance with recitals 4, 6 and 21 InfoSoc, which require legal certainty for rightholders on the protection of their works.<sup>107</sup> Pursuant to these principles, the CJEU stated that the temporary acts of reproduction is "transient" if it does not exceed what is necessary to the completion of the technological process,<sup>108</sup> and maintained that objectives of legal certainty require the storage and deletion of the copy not to depend on human intervention, as confirmed by Recital 33, which refers to "automatic processes" such as acts enabling browsing and caching.<sup>109</sup>

Two years later, the Court elaborated more on Article 5(1) InfoSoc in *Football Association Premier League (FAPL)*,<sup>110</sup> dealing with the alleged infringement committed by suppliers of equipment and satellite decoder cards that enable the reception of Premier League programs transmitted by foreign broadcasters, in violation of the exclusivity of the rights granted by *FAPL* in a given territory to specific distributors. First, the CJEU clarified that, for a finding of infringement, it is irrelevant whether the reproduction is stable or it has an ephemeral existence. In this way, it suggested that the notion of temporary reproduction covers also very short fragments, stopping just before the borders of the exception laid down by Article 5(1) InfoSoc.<sup>111</sup> Then, asked whether acts of reproduction performed within the memory of a satellite decoder and on a television screen fulfilled the conditions set by Article 5(1) InfoSoc, the CJEU listed the five requirements identified by the provision, ruled that they need to be interpreted strictly but still in a manner that enable the effectiveness of the exception to be safeguarded and its purpose to be fulfilled,<sup>112</sup> and analyzed the compliance of the conduct at stake with each of them, devoting more attention to the fourth and fifth conditions. As to the lawfulness of the use enabled by the temporary reproduction, the Court verified whether the picking up of the broadcast and

---

<sup>103</sup> Case C-833/19 *SI and Brompton Bicycle Ltd v Chedech / Get2Get* (2020) EU:C:2020:461, para 26.

<sup>104</sup> *Infopaq*, para 54.

<sup>105</sup> *ibid* para 55.

<sup>106</sup> *ibid* para 56.

<sup>107</sup> *ibid* para 58-59.

<sup>108</sup> *ibid* para 61.

<sup>109</sup> *ibid* paras 62-63.

<sup>110</sup> *ibid* para 66.

<sup>111</sup> *FAPL* (n 76).

<sup>112</sup> *ibid* paras 162-163.

their visual display in private circles<sup>113</sup> were not acts restricted by the EU or national legislations.<sup>114</sup> With regard to the lack of independent economic significance of the act of reproduction, the CJEU underlined that, in order not to make the provision redundant, the “significance” should be independent “in the sense that it goes beyond the economic advantage” derived from the use that the reproduction itself enabled.<sup>115</sup> This suggests a normative rather than technical approach to the notion of temporary reproduction, which does not submit to the rightholder’s control acts which do not impact on her economic interest and, therefore, do not need to be covered by exclusivity for copyright to perform its essential function to ensure that rightholders receive an appropriate remuneration from the exploitation of their works.

The Court had the opportunity to broaden the analysis of the notion of temporary reproduction and of the scope of Article 5(1) InfoSoc in *Infopaq II*<sup>116</sup> and *Meltwater*.<sup>117</sup>

*Infopaq II* added further specifications and made a slight step forward compared to *FAPL*. It specified that being “an integral and essential part of a technological process” requires the act of reproduction to be carried out entirely within the process itself, being it irrelevant at which stage it take place.<sup>118</sup> At the same time, however, it overruled its precedent, admitting that the technological process may involve a human intervention, and particularly a manual activation, without prejudicing the transient nature of the reproduction.<sup>119</sup> As to the independent economic significance, the CJEU clarified that the efficiency gains deriving from the implementation of the reproduction should not be taken into account, for they materialize only during the use of the reproduced subject matter within the technological process, thus being not distinguishable from the advantages derived from the latter.<sup>120</sup> On the contrary, the temporary reproduction would have an independent economic significance if it could facilitate a different use of the subject matter reproduced, or if the temporary reproduction could be independently exploited.<sup>121</sup> In line with the normative approach, the CJEU also concluded that, when a conduct meets the requirements indicated by Article 5(1) InfoSoc, then it can be presumed that it does not conflict with the three-step test, and particularly with the condition of the exception not conflicting with the normal exploitation of the work.<sup>122</sup>

In *Meltwater* a company providing to its customers reports on press articles published on the internet was sued by NLA, an entity managing collective licenses on UK newspaper content, which argued that the licence obtained by Meltwater to extract and re-use the articles was not enough, since also the online receipt of the reports by Meltwater’s customers required the rightholders’ authorization. The question was whether the on-screen copies and the cache copies

---

<sup>113</sup> *ibid* para 170.

<sup>114</sup> *ibid* para 171.

<sup>115</sup> *ibid* paras 172-175.

<sup>116</sup> Order in case C-302/10 *Infopaq International A/S v Danske Dagblades Forening* [2012] EU:C:2012:16.

<sup>117</sup> Case C-360/13 *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others (Meltwater)* [2014] EU:C:2014:1195.

<sup>118</sup> *Infopaq II*, paras 30-31.

<sup>119</sup> *ibid* paras 32, 36.

<sup>120</sup> *ibid* para 51.

<sup>121</sup> *ibid* paras 52-3.

<sup>122</sup> *ibid* para 55.



generated by users when viewing the website constituted a transient reproduction covered by Article 5(1) InfoSoc.

Confirming *Infopaq II*, the Court stated that the reproduction and its deletion may be considered transient if the processes are activated by the user,<sup>123</sup> and that it is enough for the copy to last until the termination of the process in order to remain within the scope of Article 5(1) InfoSoc.<sup>124</sup> Similarly, the “incidental” nature of the copy is confirmed by their automatic deletion in the case of on-screen copies, it being irrelevant that this happens only when the end-user closes the browser.<sup>125</sup> In the case of cache copies, which are retained on the user’s hard disk for subsequent visualizations of the same website, the CJEU confirmed their incidental nature *vis-a-vis* the technological process, excluding the need for them to be also transient in order to apply Article 5(1) InfoSoc,<sup>126</sup> for “transient” and “incidental” are alternative and not cumulative requirements. The conclusion was further reinforced by the teleological consideration of the fundamental role played by cached copies to facilitate browsing, and of the fact that without them “the internet would be unable to cope with the current volumes of data transmitted online”.<sup>127</sup>

*Meltwater* also contributed to the understanding of the effects of the three-step test on the application of Article 5(1) InfoSoc. The Court found that the legitimate interests of rightholders were duly protected since publishers of the websites already obtained a proper authorization from copyright holders to communicate to the public their content.<sup>128</sup> Thus, there was no justification for requiring internet users to obtain another authorization for a transient reproduction that was essential for them to enjoy the very same communication.<sup>129</sup> The normal exploitation of the works was not compromised either, for the copies were incidental to the technological process necessary for viewing the websites, which represented the very normal exploitation of such works once they were communicated to the public upon the authorization of rightholders.<sup>130</sup> Once again, the normative approach to the notion of temporary reproduction prevailed in the interpretation of the Court, thanks to the functional and economic analysis suggested by Article 5(1) and (5) InfoSoc.

Recently, in the *Filmspelers* case,<sup>131</sup> the CJEU reiterated that the conditions of Article 5(1) InfoSoc are cumulative and to be interpreted strictly, particularly in light of the three-step test,<sup>132</sup> and it focused again on the notion of lawful use, adding the need to assess also this requirement against Article 5(5) InfoSoc.<sup>133</sup> On this basis, the Court derived the unlawfulness of the

---

<sup>123</sup> *Meltwater*, paras 30, 41.

<sup>124</sup> *ibid* para 42.

<sup>125</sup> *ibid* paras 44-45.

<sup>126</sup> *ibid* para 48.

<sup>127</sup> *ibid* para 35.

<sup>128</sup> *ibid* para 57.

<sup>129</sup> *ibid* para 59.

<sup>130</sup> *ibid* para 61.

<sup>131</sup> Case C-527/15 *Stichting Brein v Jack Frederik Wullems* [2017] EU:C:2017:300

<sup>132</sup> *ibid* paras 61-63.

<sup>133</sup> *ibid* para 66. The conclusion is fully in line with Case C-435/12 *ACI Adam and Others v Stichting de ThuisKopie* [2014] EU:C:2014:254, paras 26 et seq, where the Court underlined the need to assess the actual impact of the exception under Article 5(2)(b) through the lens of the three-step test, excluding on this basis that a private levy system for the collection of the fair compensation due to authors in case of private copying could apply also to reproductions made from unlawful sources.

temporary reproduction not from formal EU or national rules, but from the adverse impact of the temporary acts of reproduction on the normal exploitation of the work and the unreasonable prejudice to the legitimate interest of the rightholder.<sup>134</sup>

### *Partial reproduction*

The leading precedent defining the boundaries of the notion of “reproduction in part” is, again, *Infopaq*. Here, the Court concluded that nothing in the InfoSoc Directive or in any other relevant copyright-related directive suggests that parts of a work should be treated differently than the work as a whole.<sup>135</sup> This implies that any fragment may be protected if it contains “elements which are the expression of the intellectual creation of the author of the work”.<sup>136</sup> On the basis of the principles of high level of protection (Recital 9 InfoSoc) and broad interpretation (Recital 21 InfoSoc) of exclusive rights, also isolated sentences or parts thereof may be protected by the exclusivity granted by the right of reproduction if they may be “suitable for conveying to the reader the originality” of the work they are extracted from,<sup>137</sup> no matter how short. The notion of partial reproduction construed by the Court is thus of a qualitative and not of a quantitative nature. The same approach characterizes the field of software program. In *SAS Institute*, the CJEU ruled that the extraction of part of the source or object code to create similar elements of a software in another one constitutes partial reproduction under Article 4(a) Software I, while the mere reproduction of the functionality of the program by using the same programming language and the same format of data files, without decompilation or access to the source code, does not infringe any exclusive right.<sup>138</sup>

It took much longer for the Court to finally intervene on the long debate on the meaning of “partial reproduction” in the field of related rights, particularly heated due to the threshold requested for the protection of entrepreneurial rights against the higher standards set for authors’ rights.<sup>139</sup> *Pelham* seemed to provide a final and stable response, focusing on the most controversial topic discussed by scholars and courts – that of music sampling. The controversial reproduction concerned the use of 2 seconds of a rhythm sequence from the song “Metall auf Metall”, authored by the group Kraftwerk in 1977, in Pelham’s song “Nur mir”, released in 1997. The main claim was centred on the infringement of the reproduction right of the phonogram producer under Article 2(c) InfoSoc, and the question raised to the CJEU was whether the copy of such a short sound sample could amount to a “reproduction in part”.

---

<sup>134</sup> *ibid* paras 69-70.

<sup>135</sup> *Infopaq*, para 38.

<sup>136</sup> *ibid* para 40.

<sup>137</sup> *ibid* para 47.

<sup>138</sup> *SAS Institute*, paras 42-43.

<sup>139</sup> As in *European Copyright Society*, Opinion in relation to the pending reference before the CJEU in *Cofemel v G-Star*, C-683/17, available at [https://europeancopyrightsocietydotorg.files.wordpress.com/2018/11/ecs-opinion-cofemel\\_final\\_signed.pdf](https://europeancopyrightsocietydotorg.files.wordpress.com/2018/11/ecs-opinion-cofemel_final_signed.pdf), accessed 26 July 2020, and *ID.*, Opinion in relation to the pending reference before the CJEU in Case C-833/18, *Brompton Bicycle v Chedech / Get2Get* (“Brompton” case), 8-9, available at <https://europeancopyrightsocietydotorg.files.wordpress.com/2019/12/ecs-opinion-brompton-final-12-12-2019-final-3.pdf>, accessed 26 July 2020. But *contra*, analyzing the CJEU case law from *Infopaq* on, see Eleonora Rosati, Copyright and the Court of Justice of the European Union (OUP 2019) 88-93; see also Tatiana E Synodinou, ‘The foundations of the concept of work in European copyright law’, in Tatiana E Synodinou (ed), *Codification of European Copyright Law. Challenges and Perspectives* (Kluwer, 2012), 99 and Tito Rendas, ‘Copyright protection of designs in the EU: how many originality standards is too many?’ (2018) 13(6) *JIPLP* 439, 442.

The Court ruled that a literal interpretation of Article 2(c) InfoSoc militates in favour of a coverage of any sound sample of a phonogram, even if very short.<sup>140</sup> This reading was also deemed consistent with the general InfoSoc goals of establishing a high level of protection of copyright and related rights, and with the specific objective of protecting the phonogram producer's investment, by allowing her to obtain a satisfactory return.<sup>141</sup> However, the CJEU found necessary to define the scope of the reproduction right also in light of the fair balance to be struck between, on the one hand, copyright and related rights and, on the other hand, the fundamental rights of users and the public interest.<sup>142</sup> Since sampling is a technique used to produce new works and thus to exercise the freedom of the arts, enshrined in Article 13 of the Charter of Fundamental Rights of the European Union<sup>143</sup> (CFREU) and covered also by Article 11 CFREU on freedom of expression,<sup>144</sup> the protection of its exercise should be weighed against the protection of intellectual property under Article 17(2) CFREU which – the CJEU reiterated – by no means attributes an absolute nature to IP rights.<sup>145</sup> On this basis, the Court ruled that “a sample taken from a phonogram and used in a new work in a modified form unrecognizable to the ear for the purposes of a distinct artistic creation” could not be covered by Article 2(c) InfoSoc, as this would not only run counter to the usual meaning of the word “reproduction” and to the case law in the field, but also to the requirement of a fair balance.<sup>146</sup> The CJEU maintained, in fact, that preventing sampling even if the reproduction would not interfere with the producer's possibility to realize a satisfactory return on investment would constitute a disproportionate violation of freedom of the arts.<sup>147</sup> For the first time, the Court defined the scope of exclusive rights using the notion of fair balance between conflicting fundamental rights, which until this point had come into play only in the field of exceptions and intermediary injunctions.<sup>148</sup>

### *Format shifting: reproduction or adaptation?*

Beyond the strict letter of Article 2 InfoSoc and its interpretation, an interesting intervention on the right of reproduction comes from *Art & Allposters*.<sup>149</sup> Allposters marketed on its website posters and other reproductions of paintings protected by copyright, all lawfully acquired on the market. While it was uncontested that posters on which the right of distribution under Article 4(2) InfoSoc was exhausted after their first lawful sale in the EU could be resold on the platform, it was unclear whether the same could be done with their reproductions, realized by Allposters

---

<sup>140</sup> *Pelham*, para 29.

<sup>141</sup> *ibid* para 30.

<sup>142</sup> *ibid* para 32, in line with *Renckhoff*, para 61.

<sup>143</sup> Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

<sup>144</sup> *Pelham*, paras 34–35.

<sup>145</sup> *ibid* para 33, as already recognized in Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] EU:C:2011:771, para 41; Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] EU:C:2012:85, para 41; Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* [2014] EU:C:2014:192, para 61.

<sup>146</sup> *Pelham*, para 37.

<sup>147</sup> *ibid* para 38.

<sup>148</sup> As I already had the opportunity to note in Caterina Sganga, ‘A Decade of Fair Balance, and How to Fix It. Copyright versus Fundamental Rights before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online’ (2019) 11 EIPR 683.

<sup>149</sup> Case C-419/13 *Art & Allposters International BV v Stichting Pictoright* [2015] EU:C:2015:27.

on canvas, wood and other materials. The question raised to the Court was whether the alteration of the medium and commercialization of the work in a new form could still allow the application of Article 4(2) InfoSoc or constituted, instead, copyright infringement.

The first problem the CJEU had to face was the qualification of the conduct as a reproduction or an adaptation of protected works. In the latter case, the Court would have needed to declare its lack of competence, for the adaptation right is not generally harmonized by EU law.<sup>150</sup> To circumvent the obstacle, the Luxembourg judges pointed to the fact that both posters and canvas transfers contained the image of a protected artistic work, and for this reason they all fell under the scope of the right of distribution (Article 4(1) InfoSoc). Since Article 4(2) InfoSoc refers to the first sale of “that object”, and Recital 28 InfoSoc to “the work incorporated in a tangible article”, the Court concluded that the intention of the EU legislator was to give authors control over the initial market of each tangible object embodying their intellectual creation.<sup>151</sup> This implies that exhaustion applies only to the very same copy placed onto the market with the rightholder’s consent, and not to subsequent alterations to its physical medium. Such an alteration, even if it slightly modifies the original by increasing the durability and quality of the image in comparison with the poster, is classified as a new reproduction covered by Article 2(a) InfoSoc.<sup>152</sup> Answering to *Allposters*’ objection that there was no multiplication of copies and thus no reproduction, since the image was transferred on canvas and no longer appeared on the poster, the CJEU ruled that the circumstance was immaterial, and that the alteration of the medium created a new copy, different than the one that was originally placed onto the market.<sup>153</sup> The conclusion was also justified by the need to offer a high level of protection to rightholders, allowing them to obtain an appropriate reward from the commercialization of their works,<sup>154</sup> where “appropriate” equals to “reasonable in relation to the economic value of the exploitation of the protected work”.<sup>155</sup> Since the economic value of canvas transfers exceeds that of posters and constitutes an additional form of exploitation of the same protected work, the Court stated that it is coherent with the objectives of the Directive and with the rationale of Article 4(2) InfoSoc to exclude the application of exhaustion, in order to let rightholders retain control on such new markets.<sup>156</sup>

Compared to the relatively cautious approach adopted in the fields of temporary and partial reproduction, the goal of extending the boundaries of the EU harmonization to cover also the right of adaptation led the Court to stretch the borders of Article 2 InfoSoc to include also modifications of the original medium. This is in line with the practice of those Member States where the borders between reproduction and adaptation are not clearly drawn,<sup>157</sup> but departs from the general attitude the CJEU has developed through the years *vis-à-vis* the judicial

---

<sup>150</sup> *ibid* para 24.

<sup>151</sup> *ibid* para 37.

<sup>152</sup> *ibid* para 43.

<sup>153</sup> *ibid* paras 44-45.

<sup>154</sup> *ibid* para 47.

<sup>155</sup> *ibid* para 48, recalling *FAPL*, paras 107-109.

<sup>156</sup> *ibid*.

<sup>157</sup> Already before the issuance of the *Allposters* decision, the Commission seemed to believe that the CJEU case law in the field of reproduction and the broad language of Article 2 InfoSoc already covered adaptation, as indicated in the leaked draft summary of the responses to the public consultation on the modernization of EU copyright rules, still available here <<http://statewatch.org/news/2014/apr/eu-com-copyright-ia-draft.pdf>> (last accessed 16 July 2020).

development of concept, structure and scope of the reproduction right. The cautious attitude returns, instead, in the field of private copying, where the effort of the Court has been directed to circumscribe within clear boundaries the discretion left to Member States.

### *Private copying and fair remuneration*

The area where the Court was the most prolific is undoubtedly that of the exception for private copying under Article 5(2)(b) InfoSoc. Without delving too much into details that would go beyond the scope and aim of this study, suffice is to note that the almost totality of the decisions focused on the notion of “fair” compensation – which is mandatory, contrary to the optional nature of exceptions<sup>158</sup> – and the compatibility of national schemes devised to compensate rightholders with the criteria set by Recitals 35 and 38 InfoSoc, the three-step test and the principle of effectiveness.<sup>159</sup> The CJEU attributes the right originally, and in an unwaivable format, to the rightholder affected in their reproduction right,<sup>160</sup> and requires that the persons ultimately obliged to correspond the compensation be the users of the work, in light of the damage they caused.<sup>161</sup> Since it is impossible to identify each private individual who makes a copy, national legislators are allowed to create levy systems that indirectly charge consumers by using levies on equipment, copying devices and media to be paid by producers, who will later pass the amount on to consumers by embedding it within the final price.<sup>162</sup> The harm is presumed, although a minimum link between levy and actual use is required, so much that the CJEU struck down systems where the levy was applied without distinction to all digital equipment, even when used not by natural persons,<sup>163</sup> or where fair compensation schemes were funded by the state budget.<sup>164</sup> With subsequent specifications, the Court added that the rightholder’s consent to the reproduction should have no impact on the claim, and the same apply to the decision not to use technological protection measures.<sup>165</sup> Multifunctional media may be subject to levy even when their main function is not that to make copy.<sup>166</sup> Chain of devices could be subject to levies in proportion to their contribution to make the reproduction possible, provided that the overall amount of the compensation is not substantially different from the amount fixed in case of single device, to respect the principle of equal treatment.<sup>167</sup> At the same time, Member States may presume the private use of devices distributed to natural persons, but must provide for the possibility of reimbursement in case of commercial uses,<sup>168</sup> and cannot apply levies to copies obtained from unlawful sources.<sup>169</sup>

---

<sup>158</sup> As also noted by Mathias Leistner, ‘Europe’s Copyright Law Decade: Recent Case Law of the European Court of Justice and Policy Perspectives (2014) 51 CMLR 586.

<sup>159</sup> See, in this respect, Case C-467/08 *Padawan v SGAE* [2010] EU:C:2010:620, paras 39 et seq.; case C-462/09, *Stichting de ThuisKopie v Opus Supplies Deutschland GmbH et al* [2011] EU:C:2011:397, paras 33 et seq.

<sup>160</sup> *Luksan*, paras 88, 96.

<sup>161</sup> *ibid* para 97.

<sup>162</sup> As in *Padawan*, para 46.

<sup>163</sup> *ibid* paras 51, 54.

<sup>164</sup> Case C-470/14 *EGEDA and Others v AMETIC* [2016] EU:C:2016:418

<sup>165</sup> Joined cases C-457-458-459-460/11 *VG Wort v Kyocera and Others* [2013] EU:C:2013:426, para 78.

<sup>166</sup> Case C-463/12 *Copydan Båndkopi v Nokia Danmark* [2012] EU:C:2015:144.

<sup>167</sup> *VG Wort*, para 79.

<sup>168</sup> *ibid*.

<sup>169</sup> *ACI Adam*, paras 29 et seq.

### *Other exceptions to the right of reproduction (Article 5(2) and (3) InfoSoc)*

The case law on other exceptions to the right of reproduction under Article 5(2) and (3) InfoSoc is numerically less conspicuous, but still highly significant for the purpose of defining the scope of the entitlement.

*Painer*<sup>170</sup> intervened on Article 5(3)(e) InfoSoc, which authorizes reproductions “for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings”. The case, concerning the unauthorized publication of photographs realized by Ms Painer, which portrayed a girl abducted and later released, on a number of newspapers reporting on the event, clarified the scope of the exception with regard to the meaning of the concept of “public security”. The CJEU noted that the InfoSoc provision is silent on the matter, thus leaving a broad discretion to Member States,<sup>171</sup> with the idea that each national legislator is best placed to define the requirements of public security “in the light of historical, legal, economic or social considerations specific to it”.<sup>172</sup> Such discretion, however, should be exercised in compliance with EU law, and particularly with the principle of proportionality,<sup>173</sup> and it should not run against the principal purpose of the InfoSoc Directive, identified in the need to establish a high level of protection for rightholders.<sup>174</sup> National provisions should also comply with the three-step test<sup>175</sup> and need for legal certainty for authors with regard to the protection of their works,<sup>176</sup> and should follow the principle of strict interpretation of exceptions.<sup>177</sup> On this basis, the Court ruled that the media cannot decide alone whether a public interest goal justify the reproduction and/or communication to the public of a protected work, being this a prerogative of States and competent national authorities.<sup>178</sup> The judges also denied the possibility to use freedom of expression and freedom of the press to broaden the scope of the exception, maintaining that the goal of Article 5(3)(e) InfoSoc was not to strike a balance between Article 10 CFREU and copyright, but between copyright and public security.<sup>179</sup> On the contrary, *Painer* used the notion of fair balance between the right of reproduction and freedom of expression to exclude that the quotation exception of Article 5(3)(d) InfoSoc requires the quotes to be embedded within a protected work, since in the opinion of the Court this strict interpretation would have made it impossible for the provision to remain effective and fulfil its purpose.<sup>180</sup>

Two years later it was the turn of the parody exception (Article 5(3)(k) InfoSoc) in *Deckmyn*.<sup>181</sup> The case concerned the possibility to define as a parody a drawing published on a calendar,

---

<sup>170</sup> (n 95).

<sup>171</sup> *Painer*, para 101. See, similarly, *Stichting de Thuis kopie*, para 23.

<sup>172</sup> *Painer*, para 102.

<sup>173</sup> *ibid* paras 103-104.

<sup>174</sup> *ibid* para 107.

<sup>175</sup> *ibid* para 110.

<sup>176</sup> *ibid* para 108.

<sup>177</sup> *ibid* para 109.

<sup>178</sup> *ibid* para 111-113

<sup>179</sup> *ibid* paras 114-115.

<sup>180</sup> *ibid* paras 132-133.

<sup>181</sup> Case C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* [2014] EU:C:2014:2132.

which used in a mockery the main character of a 1961 comic book - “The Compulsive Benefactor” – to criticize the Mayor of Ghent. The CJEU ruled that parody is an autonomous notion of EU law,<sup>182</sup> which requires a uniform interpretation across the Union. To reinforce the full harmonization of the exception, the Court added that, since the application of Article 5(3)(k) InfoSoc should preserve the fair balance between copyright and freedom of expression,<sup>183</sup> national legislators cannot introduce any restrictive criteria to the provision, except for those deriving from the commonly known features of parody. With this move and the link between parody and freedom of exception, *Deckmyn* implicitly transformed Article 5(3)(k) into a mandatory exception, which Member States should implement unless they can prove that they could strike through other means the same fair balance between copyright and Article 11 CFREU in similar circumstances.<sup>184</sup>

*Ulmer* offered an articulated interpretation of Article 5(3)(n) InfoSoc, which introduces an exception to the rights of reproduction and communication to the public for the making available of protected works by libraries and other cultural establishments on dedicated terminals, for the purpose of research or private study, provided that such works are contained in their collections and are not subject to purchase or licensing terms.<sup>185</sup> Looking at the provision’s goal to facilitate the fulfilment of the core mission of publicly accessible libraries, which is to advance the public interest in promoting research and private study through the dissemination of knowledge,<sup>186</sup> the CJEU excluded that the rightholder’s offer to conclude a licensing agreement could be sufficient to rule out the application of Article 5(3)(n), requiring instead an existing contractual relation.<sup>187</sup> A stricter condition – the Court ruled – would have subordinated the exception to the unilateral and discretionary action of the copyright owner,<sup>188</sup> running counter to the fair balance between the rights and interests of rightholders and users<sup>189</sup> and depriving the provision of any effectiveness, save for its application to rare and economically less significant works.<sup>190</sup> According to the same principle, and in order to ensure the fulfilment of the purpose of the exception, the CJEU offered an extensive interpretation of the provision, stretching its scope to cover also acts of reproduction necessary for the library to digitize their collections in order to make them available to their patrons on dedicated terminals.<sup>191</sup> However, only reproductions under an ancillary right stemming from the combined provisions of Articles 5(2)(c) and 5(3)(n) InfoSoc could be permitted, with the exclusion of unnecessary acts of copying such as the printing or transfer on USB keys of digitized works by users.<sup>192</sup>

---

<sup>182</sup> *ibid* para 15.

<sup>183</sup> *ibid* para 25.

<sup>184</sup> See European Copyright Society, ‘Opinion on the Judgment of the CJEU in Case C-201/13 *Deckmyn*’ [2015] 37(3) EIPR 127, 130.

<sup>185</sup> Case C-117/13 *Technische Universität Darmstadt v Eugen Ulmer KG* [2014] EU:C:2014:2196.

<sup>186</sup> *ibid* para 27.

<sup>187</sup> *ibid* para 30.

<sup>188</sup> *ibid* para 28.

<sup>189</sup> *ibid* para 31.

<sup>190</sup> *ibid* para 32.

<sup>191</sup> *ibid* para 43: “Such a right of communication of works enjoyed by establishments such as publicly accessible libraries covered by Article 5(3)(n) of Directive 2001/29, within the limits of the conditions provided for by that provision, would risk being rendered largely meaningless, or indeed ineffective, if those establishments did not have an ancillary right to digitise the works in question.”

<sup>192</sup> *ibid* paras 54 and 56, in line with Article 5(5) InfoSoc and its three-step test.

Recently, the Grand Chamber of the CJEU issued three of its most relevant interventions in the field of exceptions. *Funke Medien, Pelham* and *Spiegel Online* – rapporteur Ilesic -, have introduced key principle for the entire spectrum of copyright exceptions and limitations, answering to the most controversial questions raised on the interplay between fundamental rights and copyright. At the same time, the three cases intervened – albeit more marginally – to specific exceptions to the right of reproduction, clarifying their meaning and scope.

On the side of general principles, the Court specified that, as opposed to exclusive rights, which are fully harmonized by the InfoSoc Directive,<sup>193</sup> Articles 5(2) and (3) InfoSoc, coupled with preparatory works, narrow down the discretion left to Member States in regulating exceptions, and make it dependent on the impact of their degree of harmonization on the smooth functioning of the internal market.<sup>194</sup> National legislators are limited by general principles of EU law (e.g., proportionality), by the conditions set by Article 5 InfoSoc, by the three-step-test, by the need to respect the goal of the directive and to safeguard the effectiveness, purpose and fair balance of the exception, and by the CFREU.<sup>195</sup> The CJEU also reinforced the validity of the *Melloni* doctrine in the field of copyright, reiterating that national authorities and courts may apply national standards of protection of fundamental rights only if this does not lower the protection offered by the CFREU and does not prejudice the primacy, unity and effectiveness of EU law.<sup>196</sup> The core of the Grand Chamber trio resides in the definition of the interplay between copyright exceptions and fundamental rights, depicted as a spectrum of situations having different nuances. The Court excluded that fundamental rights could not be used to introduce new exceptions beyond the scope of Article 5 InfoSoc, in light of the exhaustive nature of the list provided therein, and the need apply exceptions consistently across the EU, in order to preserve legal certainty and the functioning of the internal market.<sup>197</sup> However, and confirming earlier decisions,<sup>198</sup> the CJEU reiterated that to ensure that the effectiveness of exceptions is safeguarded, national courts may and should provide also extensive interpretation of such provisions if needed, and particularly when the protection of a fundamental right or freedom is involved.<sup>199</sup>

Fundamental rights return as an interpretative tool to draw the border of exceptions. *Spiegel Online* ruled out that the exception of reproduction for purpose of reporting current events (Article 5(3)(c) InfoSoc) may be subject to the author’s prior consent, arguing that the provision of such a requirement would make it impossible for the norm to achieve its goal of allowing a fast dissemination of information among the general public, and thus to protect freedom of expression and press.<sup>200</sup> More generally, the CJEU took the opportunity to provide a harmonized definition of the exception,<sup>201</sup> maintaining that the notion of “reporting” does not require to analyze the event in detail, while that of “current event” emphasizes the importance of having a

---

<sup>193</sup> *Funke Medien*, paras 29-38; *Pelham*, paras 78-85.

<sup>194</sup> *Funke Medien*, paras 39-44; *Spiegel Online*, paras 23-38.

<sup>195</sup> *Funke Medien*, paras 45-53; *Spiegel Online*, paras 31-38.

<sup>196</sup> Case C-399/11 *Stefano Melloni v Ministero Fiscal* [2013] EU:C:2013:107. *Funke Medien*, paras 30, 32; *Pelham*, paras 78, 80; *Spiegel Online*, paras 19, 21.

<sup>197</sup> *Funke Medien*, paras 56-63; *Pelham*, paras 58-64; *Spiegel Online*, paras 41-48.

<sup>198</sup> *Funke Medien*, para 68; *Spiegel Online*, para 52.

<sup>199</sup> *Funke Medien*, para 71; *Spiegel Online*, para 55.

<sup>200</sup> *Spiegel Online*, paras 71-73.

<sup>201</sup> *ibid* para 65.



public informatory interest in order to justify the derogation to exclusive rights,<sup>202</sup> and to limit the use of a protected work to the extent necessary to the purpose.<sup>203</sup>

The decision intervened also on the definition of the concept of “quotations” for criticism or review under Article 5(3)(d) InfoSoc, offering an interpretation based on the usual meaning of the word in the everyday language and taking into account legislative context and purpose of the provision. The essential characteristic of quotation was thus identified in the “use, by a user other than the copyright holder, of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user.”<sup>204</sup> In this sense, the Court agreed with Advocate General (AG) Szpunar<sup>205</sup> that Article 5(3)(d) requires that the user “establish a direct and close link between the quoted work and his own reflections, thereby allowing for an intellectual comparison to be made with the work of another”, and that the quoted excerpts is not secondary nor so extensive as to violate Article 5(5) InfoSoc.<sup>206</sup> Yet, the decision excluded the need for the quote to be inextricably embedded into the citing work, admitting also that a hyperlink could constitute a quotation. The conclusion was grounded on the key role played by hyperlinks in fostering freedom of expression and of information on the internet,<sup>207</sup> and on the need to strike a fair balance between the latter and the right of reproduction. In line with *Spiegel Online*, also *Pelham* ruled that to have a quotation it is necessary that the user of a protected work had the intention of entering into a dialogue with the work quoted. The principle, applied in the context of sound samples taken from a phonogram, requires that it remains possible to identify the work quoted and embedded in a new song, so much that a dialogue between quoting and quoted works could be cognizable by an external listener.<sup>208</sup>

## Conclusions

Differently than in the cases of the right of distribution, and even more of the right of communication to the public, the definition and scope of the reproduction right have not been subject to unexpected stretches or great degrees of overhaul in the past two decades. After the heated debates that surrounded its complex update and reform along the 1990s, in response to the advent of the internet, the increased spread of personal computers and the digitization of protected works, the most classic among the exclusive rights settled on an apparently very broad legislative definition. Commentators, activists and policy makers feared that a purely technical interpretation of the notion of reproduction could lead to attributing to copyright owners the monopoly over too wide an array of conducts, regardless of their actual impact on the normal exploitation of the works. However, their dreads were progressively dispelled by a relatively

---

<sup>202</sup> *ibid* paras 66-67.

<sup>203</sup> *ibid* para 68.

<sup>204</sup> *ibid* para 78.

<sup>205</sup> Opinion of AG Szpunar in Case C-516/17 *Spiegel Online* [2019] EU:C:2019:16, para 43.

<sup>206</sup> *Spiegel Online*, para 79.

<sup>207</sup> *ibid* para 81, recalling case C-160/15 *GS Media BV v Sanoma Media Netherlands BV and Others* [2016] EU:C:2016:644, para 45, and *Renckhoff*, para 40. In the field of secondary liability, however, see the distinction made by the recent Opinion of AG Saugmandsgaard Øe in Joined Cases C-682/18 and C-683/18, *Frank Peterson v Google LLC, YouTube LLC, YouTube Inc., Google Germany GmbH (C-682/18) and Elsevier Inc. v Cyando AG (C-683/18)* [2020] EU:C:2020:586.

<sup>208</sup> *Pelham*, paras 72-74.

balanced definition of the notions of temporary and partial reproduction by the CJEU, which has adopted a cautious and mostly normative approach, limiting the scope of the right to what was necessary to ensure that rightholders retain control over economically significant uses of their works. As a sort of final act of the saga, the Court went even as far as to use the concept of fair balance between conflicting fundamental rights to set the boundaries of Article 2 InfoSoc, excluding that short sound samplings violated the reproduction right of producers of phonograms, and thus introducing into the teleological interpretation of the provision an element of constitutionalization<sup>209</sup> that has never featured the field beforehand.

Pitfalls and criticisms have mostly concerned “side” products of the interpretation that the Court offered of Article 2 InfoSoc, e.g., the definition of protected subject matter, still affected by great uncertainty and not effectively circumscribed. However, this has not prejudiced the judicial development of the right of reproduction, which is still characterized by a greater clarity and a more balanced construction than the two other exclusive rights harmonized by the InfoSoc Directive, featuring, instead, an often uncontrolled expansion, which severely impact on the copyright balance.

The road ahead to fully adjust Article 2 InfoSoc to current times and technologies is still rather long. Yet, the approach adopted by the CJEU is promising, and draws a path of legal certainty, balanced teleological consideration of the dichotomy exclusivity-access and stability in doctrines and interpretative outputs that could be used – save for some flaws - as a role model for the construction of other exclusive rights.

## References

### *Bibliography*

- Bently, Lionel, Sherman, Brad (2004) *Intellectual Property Law* (2nd ed, OUP).
- Dillon, Thomas (2016), ‘Evidence, policy and ‘evidence for policy’, 11(2) *JIPLP* 92.

---

<sup>209</sup> The “constitutionalization” of intellectual property, and particularly of copyright, is the label used by several scholars to identify the process that has led to the use of fundamental rights to interpret and - in some instances – advance the harmonization of EU copyright law. See, *inter alia*, Jonathan Griffiths, ‘Constitutionalising or harmonizing? The Court of Justice, the right to property and European copyright law’ [2013] 38 *ELR* 65; Christophe Geiger, ‘“Constitutionalising” intellectual property law? The influence of fundamental rights on intellectual property in the European Union’ [2006] 35 *IIC* 371; Martin Husovec, ‘Intellectual Property Rights and Integration by Conflict: the Past, Present and Future’ [2016] 18 *Cambridge Yearbook of European Legal Studies* 239, 262; Tuomas Mylly, ‘The constitutionalisation of the European legal order: impact of human rights on intellectual property in the EU’, in Christophe Geiger (ed), *Research Handbook on Intellectual Property and Human Right* (Edward Elgar 2015), 119; Jens Schovsbo, ‘Constitutional foundations and constitutionalization of IPR law’ [2015] *Zeitschrift für Geistiges Eigentum* 383; Jonathan Griffiths, ‘Taking Power Tools to the Acquis - The Court of Justice, the Charter of Fundamental Rights and European Union Copyright Law’, in Christophe Geiger (ed), *Intellectual Property and the Judiciary* (Edward Elgar 2018); Stijn van Deursen and Thom Snijders, ‘The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Framework’ (2018) 49 *IIC* 1080; Peter Oliver and Christopher Stothers, ‘Intellectual Property under the Charter: Are the Court’s Scales Properly Calibrated?’ (2017) 54 *CMLR* 517.

- Drier, Thomas, Hugenholtz, Bernt (eds) (2006), *Concise European Copyright Law* (OUP).
- European Commission (1988), *Green Paper Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action*, COM(88) 172 final.
- European Commission (1995), *Green Paper 'Copyright and Related Rights in the Information Society'* COM(95) 382 final.
- European Commission (1996), *Follow-up to the Green Paper on copyright and related rights in the Information Society*, COM (96) 586 final.
- European Commission (1997), *Explanatory Memorandum to the Proposal for a Directive on the harmonization of certain aspects of copyright and related rights in the Information Society*, COM(97) 628 final.
- European Commission Staff Working Paper (2004), *Review of the EC legal framework in the field of copyright and related rights*, SEC(2004) 995.
- European Copyright Society (2015), 'Opinion on the Judgment of the CJEU in Case C-201/13 Deckmyn', 37 EIPR 127.
- European Copyright Society (2019), *Opinion in relation to the pending reference before the CJEU in Cofemel v G-Star, C-683/17*, available at [https://europeancopyrightsocietydotorg.files.wordpress.com/2018/11/ecs-opinion-cofemel\\_final\\_signed.pdf](https://europeancopyrightsocietydotorg.files.wordpress.com/2018/11/ecs-opinion-cofemel_final_signed.pdf)
- European Copyright Society (2019), *Opinion in relation to the pending reference before the CJEU in Case C-833/18, Brompton Bicycle v Chedech / Get2Get ("Brompton" case)*, available at <https://europeancopyrightsocietydotorg.files.wordpress.com/2019/12/ecs-opinion-brompton-final-12-12-2019-final-3.pdf>.
- Geiger, Christophe (2006), "'Constitutionalising" intellectual property law? The influence of fundamental rights on intellectual property in the European Union' 35 IIC 371;
- Griffiths, Jonathan (2018), 'Taking Power Tools to the Acquis - The Court of Justice, the Charter of Fundamental Rights and European Union Copyright Law', in Geiger, Christophe (ed), *Intellectual Property and the Judiciary* (Edward Elgar).
- Griffiths, Jonathan, (2013), 'Constitutionalising or harmonizing? The Court of Justice, the right to property and European copyright law', 38 ELR 65.
- Guibault, Lucie, Westkamp, Guido, Rieber-Mohn, Thomas (2007), 'Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society', Report to the European Commission.
- Hugenholtz, Bernt et al. (2006), *The Recasting of Copyright and Related Rights for the Knowledge Economy. Report to the European Commission, DG Internal Market*.
- Hugenholtz, Bernt, Koelman, Kamiel (1999), 'Copyright Aspects of Caching: Digital Intellectual Property Practice Economic Report', Amsterdam, Institute for Information Law.
- Husovec, Martin (2016), 'Intellectual Property Rights and Integration by Conflict: the Past, Present and Future', 18 Cambridge Yearbook of European Legal Studies 239.
- Jütte, Bernd Justin, Quintais, Joao, (2019), 'Advocate General Turns down the Music – Sampling Is Not a Fundamental Right under EU Copyright Law', 41 EIPR 654.
- Kretschmer, Martin (2003), 'Digital Copyright: the End of an Era', 25 EIPR 333.

- Legal Advisory Board (1996), Reply to the 1995 Green Paper on Copyright and Related Rights in the Information Society, Brussels
- Leistner, Mathias (1999), 'Der neue Rechtsschutz des Datenbankherstellers', GRUR Int 819.
- Leistner, Mathias (2014), 'Europe's Copyright Law Decade: Recent Case Law of the European Court of Justice and Policy Perspectives', 51 CMLR 586.
- Mylly, Tuomas (2015), 'The constitutionalisation of the European legal order: impact of human rights on intellectual property in the EU', in Geiger, Christophe (ed), Research Handbook on Intellectual Property and Human Right (Edward Elgar).
- Ohly, Ansgar (2008), 'Economic rights', in Estelle Derclaye (eds) Research Handbook on the Future of EU Copyright (Elgar), 212.
- Oliver, Peter, Stothers, Christopher (2017), 'Intellectual Property under the Charter: Are the Court's Scales Properly Calibrated?', 54 CMLR 517.
- Records of the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions (1996) WIPO Publication 348, docs CRNR/DC/22, CRNR/DC/53, CRNR/DC/53, CRNR/DC/56, CRNR/DC/73
- Reimer, Dietrich, Ulmer, Eugen (1967), 'Die Reform der materiellrechtlichen Bestimmungen der Berner Ubereinkunft', GRUR Int 431.
- Reinbothe, Jorge, von Lewinski, Silke (2015), The WIPO Treaties on Copyright (2nd ed, OUP)
- Rendas, Tito (2018) 'Copyright protection of designs in the EU: how many originality standards is too many?', 13(6) JIPLP 439
- Ricketson, Sam, Ginsburg, Jane (2006), International Copyrights and Neighboring Rights. Berne Convention and Beyond (2nd ed, OUP).
- Rosati, Eleonora (2019), Copyright and the Court of Justice of the European Union (OUP).
- Schovsbo, Jens (2015), 'Constitutional foundations and constitutionalization of IPR law', Zeitschrift fur Geistiges Eigentum 383.
- Sganga, Caterina (2019), 'A Decade of Fair Balance, and How to Fix It. Copyright versus Fundamental Rights before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online', 11 EIPR 683.
- Synodinou, Tatiana (2012) 'The foundations of the concept of work in European copyright law', in Tatiana E Synodinou (ed), *Codification of European Copyright Law. Challenges and Perspectives* (Kluwer).
- Turner, Mark, Callaghan, Dominic (2008), 'You Can Look But Don't Touch! The Impact of the Google v Copiepresse Decision on the Future of the Internet', 30 EIPR 34.
- van Deursen, Stijn, Snijders, Thom (2018), 'The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Framework', 49 IIC 1080.
- van Eechoud, Mireille et al (2009), Harmonizing European Copyright Law. The Challenges of Better Lawmaking (Wolter Kluwer).
- Vivant, Michel (1992) 'Copyrightability of Computer Programs in Europe', in Alfred Meijboek, Corien Prins (eds), The Law of Information Technology in Europe (Deventer).
- Von Lewinski, Silke (2007), 'Stakeholder Consultation on Copyright Levies in a Converging World – Answers of the Max-Planck-Institut', 38 IIC 65.

- Von Lewinski, Silke (2008) *International Copyright Law and Policy* (OUP).
- Walter, Michel M (ed) (2001) *Europaisches Urheberrecht, Kommentar* (Springer)
- Walter, Michel M, von Lewinski, Silke (eds) (2010) *European Copyright Law. A Commentary* (OUP).

### *Case law*

- High Court of England and Wales, *BASCA v The Secretary of State for Business, Innovation and Skills*, [2015] EWHC 1723
- Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] EU:C:2009:465.
- Case C-393/09 *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury* [2010] EU:C:2010:816.
- Case C-467/08 *Padawan v SGAE* [2010] EU:C:2010:620.
- Case C-462/09, *Stichting de ThuisKopie v Opus Supplies Deutschland GmbH et al* [2011] EU:C:2011:397.
- Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] EU:C:2011:771.
- Case C-145/10 *Eva-Maria Painer v Standard Verlags GmbH and Others* [2011] EU:C:2011:798
- *Joined Cases C-403/08 Football Association Premier League Ltd and Others v QC Leisure and Others and C-429/08 Karen Murphy v Media Protection Services Ltd (FAPL)* [2011] EU:C:2011:631.
- *Order in case C-302/10 Infopaq International A/S v Danske Dagblades Forening* [2012] EU:C:2012:16.
- Case C-277/10 *Martin Luksan v Petrus van der Let* [2012] EU:C:2012:65.
- Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] EU:C:2012:85.
- Case C-463/12 *Copydan Båndkopi v Nokia Danmark* [2012] EU:C:2015:144.
- Case C-406/10 *SAS Institute v World Programming Ltd* [2012] EU:C:2012:259
- Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] EU:C:2013:107
- *Joined cases C-457-458-459-460/11 VG Wort v Kyocera and Others* [2013] EU:C:2013:426
- Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* [2014] EU:C:2014:192.
- Case C-435/12 *ACI Adam and Others v Stichting de ThuisKopie* [2014] EU:C:2014:254
- Case C-360/13 *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others (Meltwater)* [2014] EU:C:2014:1195.
- Case C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* [2014] EU:C:2014:2132.
- Case C-117/13 *Technische Universität Darmstadt v Eugen Ulmer KG* [2014] EU:C:2014:2196.
- Case C-419/13 *Art & Allposters International BV v Stichting Pictoright* [2015] EU:C:2015:27.

- Case C-572/13 Hewlett-Packard Belgium SPRL v Reprobel SCRL [2015] EU:C:2015:750.
- Case C-117/15, Reha Training v GEMA [2016] EU:C:2016:379.
- Case C-470/14 EGEDA and Others v AMETIC [2016] EU:C:2016:418
- Case C-160/15 GS Media BV v Sanoma Media Netherlands BV and Others [2016] EU:C:2016:644
- Case C-301/15, Marc Soulier and Sara Doke v Premier ministre and Ministre de la Culture et de la Communication [2016] EU:C:2016:878.
- Case C-527/15 Stichting Brein v Jack Frederik Wullems [2017] EU:C:2017:300
- Case C-610/15, Stichting Brein v Ziggo BV and XS4All Internet BV [2017] EU:C:2017:456.
- Case C-161/17, Land Nordrhein-Westfalen v Dirk Renckhoff [2018] EU:C:2018:634.
- Case C-310/17 Levola Hengelo BV v Smilde Foods BV [2018] EU:C:2018:899.
- Case C-469/17 Funke Medien NRW GmbH v Bundesrepublik Deutschland [2019] EU:C:2019:623.
- Case C-476/17 Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben [2019] EU:C:2019:624.
- Case C-516/17 Spiegel Online GmbH v Volker Beck [2019] EU:C:2019:625
- Case C-683/17 Cofemel – Sociedade de Vestuário SA v G-Star Raw CV [2019] EU:C:2019:721.
- Case C-833/19 SI and Brompton Bicycle Ltd v Chedech / Get2Get (2020) EU:C:2020:461.